# INDEX.

## Subject Index.


| | Page |
|---|---|
| Statement as to jurisdiction | 1 |
| Statutory provisions sustaining jurisdiction | 1 |
| State statute the validity of which is involved | 2 |
| Date of the judgment and application for appeal | 2 |
| Nature of the case and rulings below | 3 |
| Substantial nature of Federal questions | 7 |
| Exhibit "1"—Opinion of the Supreme Court of Mississippi | 9 |
| Exhibit "2"—Opinion of the Supreme Court of Mississippi on suggestion of error | 13 |
| Joint motion to advance | 15 |


## Table of Cases Cited.


| | |
|---|---|
| *Independent Gasoline Company, Inc.*, v. *Bureau of Unemployment Compensation*, 190 Ga. 613, 10 S. E. (2d) 58, 61 Sup. Ct. 175 | 7 |
| *Mississippi Unemployment Compensation Commission, et al.*, v. *Avent*, 4 So. (2d) 296, 4 So. (2d) 684 | 6 |


## Statutes Cited.


| | |
|---|---|
| Judicial Code, Section 237 (28 U. S. C. A. 344), 43 Stat. 937, Chap. 229, Sec. 1 | 1 |
| Laws of 1938 of the State of Mississippi, Chapter 147, Sec. 19 (h) (1) and (4) | 2 |
| Laws of 1940 of the State of Mississippi: | |
| Chapter 295, Sec. 13, subdivision (h) (1) and (4) | 6, 7 |
| Chapter 295, Sec. 19 (h) (4) | 4, 5, 6, 7 |

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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# No. 34,712

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T. E. AVENT,

*Appellant,*

*vs.*

MISSISSIPPI UNEMPLOYMENT COMPENSATION COMMISSION, ET AL.,

*Appellees.*

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## STATEMENT OF JURISDICTION.

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*To the Supreme Court of the State of Mississippi:*

Comes T. E. Avent, Appellee, by Creekmore & Creekmore and James Stone & Sons, his Attorneys of Record, and files this his Statement of Jurisdiction of the Supreme Court of the United States, and shows unto the Court as follows:

1.

The Supreme Court of the State of Mississippi has jurisdiction of this appeal under 43 Stat. 937, Chapter 229, Section 1; Judicial Code, Sec. 237; 28 U. S. C. A. Sec. 344; there being involved in said appeal a final Judgment of the Supreme Court of the State of Mississippi, the highest Court of said State, in which Judgment there is drawn in question the validity of a statute of the State of Mississippi on the

ground of its being repugnant to the Constitution of the United States and said decision was in favor of the validity of said statute.

2.

The statutes of the State of Mississippi which are attacked as being repugnant to the Constitution of the United States and the validity of which have been upheld by this Court in the above case are Sec. 19 (h) (1) and (4), Chapter 147 of the Laws of 1938 of the State of Mississippi and Sec. 13 of Chapter 295 of the Laws of 1940 of the State of Mississippi, subdivision (h) (1) and (4). Said statute reads as follows:

> "(h) 'Employer' means:
>
> (1) Any employing unit which for some portion of a day, but not necessarily simultaneously in each of twenty different weeks, whether or not such weeks are or were consecutive within either the current or the preceding calendar year, has or had in employment, eight or more individuals (irrespective of whether the same individuals are, or were, employed in each such day);"
>
> "(4) Any employing unit which, together with one or more employing units, is owned or controlled 'by legally enforceable means or otherwise' directly or indirectly by the same interests, or which owns or controls one or more other employing units (by legally enforcing means or otherwise), and which, if treated as a single unit with such other employing units or interests, or both would be an employer under paragraph (1) of this subsection."

Said statute is set out in General Laws of Mississippi for 1940, page 522.

The date of the Judgment sought to be reviewed is November 24, 1941, and the date on which the application for appeal is presented is February 19th, 1942.

4.

Petitioner is a citizen and resident of Lafayette County, Mississippi. Respondent, Unemployment Compensation Commission, is a Commission organized and existing under and by virtue of the laws of the State of Mississippi and having its principal offices at Jackson, Hinds County, Mississippi. Respondent, R. B. Ragland, Sr., is a citizen and resident of Lafayette County, Mississippi.

5.

Respondent, R. B. Ragland, Sr., filed his claim on September 9, 1940, with Respondent, Mississippi Unemployment Compensation Commission, claiming benefits for wage credits in covered employment as an employee of Avent's Dairy located at Oxford, Lafayette County, Mississippi, and asking to have set up for himself wage credits in covered employment under Chapter 295 of the Laws of 1940 of the State of Mississippi. This claim of said Respondent, R. B. Ragland, Sr., was denied by the Claims Examiner of said Respondent, Mississippi Unemployment Compensation Commission.

6.

Thereupon, on November 4, 1940, Respondent, R. B. Ragland, Sr., appealed from the determination above set out on the ground that he had been employed in covered employment and was entitled to have wage credits set up for himself based on his earnings in such employment.

7.

Said appeal was heard before E. S. McIntyre, Referee of said Respondent, Mississippi Unemployment Compensation Commission and said Referee, on November 27, 1940, reversed the decision of said Claims Examiner and held that said Respondent, R. B. Ragland, Sr., was entitled to

have such credits set up as such covered employee because during the period in question, Petitioner was actually the owner of both Avent's Dairy and T. E. Avent's Drug Store at Oxford, Lafayette County, Mississippi, and that under Section 19 (h) (4), Chapter 295 of the Laws of 1940 of the State of Mississippi, Petitioner had, at the time involved, more than eight covered employees, having at said drug store six covered employees and at said dairy four covered employees.

8.

Petitioner appealed from the decision of said Referee to the Board of Review of said Respondent, Mississippi Unemployment Compensation Commission, and, on January 28, 1941, said Board of Review affirmed the decision of said Referee and held that Petitioner was liable and that the wage credits sought by Respondent, R. B. Ragland, Sr., should be set up for said Respondent on the ground that Petitioner was in fact really the owner of said dairy and said drug store during the time involved, that at said time Petitioner thus had more than eight covered employees, having in said drug store six covered employees and in said dairy four covered employees, that under Section 19(h)(4), Chapter 295 of the Laws of 1940 of the State of Mississippi, Petitioner was an employer within the meaning of said law.

9.

Thereupon, on February 10, 1941, Petitioner filed in the Circuit Court of Lafayette County, Mississippi, his Petition for Review of the decision of the Board of Review of said Respondent, Mississippi Unemployment Compensation Commission, setting up that the decision of said Board of Review should be reversed because said decision was not supported by sufficient evidence; because said decision

shows the business of said dairy and the business of said drug store were totally unrelated and no employee of said drug store ever worked in said dairy and no employee of said dairy ever worked in said drug store and that if section 19(h)(4), Chapter 295 of the Laws of 1940 of the State of Mississippi made Petitioner an employer under such circumstances, the said Section 19(h)(4), Chapter 295, was unconstitutional and void because it denied Petitioner equal protection of the law and deprived Petitioner of his property without due process of law in violation of the Constitution of the United States and of the Constitution of the State of Mississippi; because said Section 19 (h)(4) was not intended to cover such a case where the businesses involved are totally unrelated and where the employees in one business do not work in the other business.

On March 5, 1941, the Respondent, Mississippi Unemployment Compensation Commission filed in said court its Answer denying all the contentions of said Petition for Review.

On March 10, 1941, by agreement of all parties, at the regular March, 1941, term of the Circuit Court of Lafayette County, Mississippi, there was entered an Order setting said cause for hearing in vacation on March 18, 1941.

On March 18, 1941, said cause came on to be heard in said Circuit Court of Lafayette County, Mississippi, and said Court entered Judgment reversing the decision of said Board of Review and holding that the dairy involved was not the property of petitioner but was the property of his wife and was not under the control of petitioner so as to make petitioner an employer subject to contributions under Chapter 295 of the Laws of 1940 of the State of Mississippi; that Section 19(h)(4), Chapter 295 of the Laws of 1940 of the State of Mississippi, was unconstitutional and void because it deprived petitioner of his rights without due process of law and deprived petitioner of

the equal protection of the laws in violation of the Constitution of the United States and in violation of the Constitution of the State of Mississippi.

In its Judgment, the said Circuit Court of Lafayette County, Mississippi, said as follows (R. 69 & 70):

> "2. That Section 19(h)(4) of said Unemployment Compensation Law of the State of Mississippi is unconstitutional and void because it deprives petitioner of his rights without due process of law and deprives petitioner of the equal protection of the laws in violation of the Constitution of the United States and in violation of the Constitution of the State of Mississippi."

10.

Thereupon, respondent, Mississippi Unemployment Compensation Commission, appealed from said decision of the Circuit Court of Lafayette County, Mississippi, to the Supreme Court of Mississippi and on November 10, 1941, the Supreme Court of Mississippi reversed the judgment of the Circuit Court of Lafayette County, Mississippi, and held that petitioner was an employer under Section 19 (h)(4) of Chapter 295 of the Laws of 1940 of the State of Mississippi. 4 So. (2d) 296.

Thereupon, petitioner filed, according to the laws of the State of Mississippi, his Suggestion of Error in said cause and on November 24, 1941, said Suggestion of Error was overruled by the Supreme Court of the State of Mississippi and said court specifically held that Section 19(h)(4), Chapter 295 of the Laws of 1940 of the State of Mississippi did not deprive petitioner of his rights without due process of law and did not deprive petitioner of the equal protection of the laws and was not in violation of the Constitution of the United States or of the Constitution of the State of Mississippi. 4 So. (2d) 684.

The Supreme Court of Mississippi in its opinion held said Section 19(h)(4), Chapter 295 of the Laws of 1940 of the State of Mississippi a state statute valid against the claim of petitioner, that said statute was, and is, repugnant to the Constitution of the United States and, therefore, the Supreme Court of the United States can take jurisdiction of said cause.

The said Supreme Court of Mississippi held (R. 79):

> "The interpretation and application of the statute is held not violative of either the State or Federal Constitution."

11.

There is appended hereto as Exhibits 1 and 2 the opinions of the Supreme Court of the State of Mississippi in said cause, being shown in the Record on pages 74 to 80 inclusive.

12.

It is contended that the questions here involved are substantial because said question has not been finally decided by the Supreme Court of the United States on identical facts and because said question involves the rights of a large number of people in the State of Mississippi and because an identical statute under a similar state of facts was held unconstitutional and void and the application of such statute was held unconstitutional and void in the case of *Independent Gasoline Company, Inc.* v. *Bureau of Unemployment Compensation* (1940), 190 Ga. 613, 10 S. E. (2d) 58, certiorari denied by the Supreme Court of the United States, 61 Sup. Ct. 175. It is contended that either the said statute attacked herein is unconstitutional or, in the alternative, if such statute as written is not unconstitutional, then the interpretation and application of it by the Supreme Court of the State of Mississippi as applied

to the particular facts in this case, constitutes a denial of due process of law and of the equal protection of the law to the Appellee in violation of the Constitution of the United States.

Respectfully submitted,

CREEKMORE & CREEKMORE,
By RUFUS CREEKMORE,
JAMES STONE & SONS,
By J. F. STONE,
*Attorneys for Petitioner.*

## EXHIBIT "1".

## IN THE SUPREME COURT OF MISSISSIPPI.

No. 34712. In Banc: 14781.

MISSISSIPPI UNEMPLOYMENT COMPENSATION COM'N., et al.

*vs.*

T. E. AVENT.

ALEXANDER, *J.:*

In 1938 and prior thereto, appellee owned a drug store and a dairy in the town of Oxford. One R. B. Ragland was employed at the dairy. At the drug store there were six employees and at the dairy four, all of whom were controlled by appellee who became subject to the requirements of our Unemployment Compensation Law (Laws 1936, ch. 176; Laws 1938, ch. 147; Laws 1940, ch. 295). Ragland thereupon became entitled, as an employee in a covered employment under the act, to have wage credits set up for his benefit in line with the policy and purposes thereof. During the year mentioned appellee, by executed deed, gave the dairy with its stock and appurtenances to his wife. Thereupon appellee discontinued the maintenance of wage credits and Ragland filed claim for benefits, which was denied by the Claims Examiner for the Commission. The finding of the Examiner was reversed by the referee, and, upon appeal to the Board of Review, the claim was again allowed. Following procedural routine under the Act, the matter was reviewed by the Circuit Court, which disallowed the claim, and the matter is before this court upon appeal from the Circuit Court.

The pertinent provisions of the Act are as follows:

"'Employing unit' means any individual or type of organization, including any partnership, association, trust, estate, joint-stock company, insurance company or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person, which has or sub-

sequent to January 1, 1935, had in its employ one or more individuals performing services for it within this state. All individuals performing services within this state for any employing unit which maintains two or more separate establishments within this state shall be deemed to be employed by a single employing unit for all the purposes of this act. Each individual employed to perform or to assist in performing the work of any agent or employee of an employing unit shall be deemed to be employed by such employing unit for all purposes of this act, whether such individual was hired or paid directly by such employing unit or by such agent, or employee, provided the employing unit had actual or constructive knowledge of the work." (Sec. 19 (g).)

"'Employer' means:

"(1) Any employing unit which for some portion of a day, but not necessarily simultaneously, in each of twenty different weeks, whether or not such weeks are or were consecutive, within either the current or the preceding calendar year, has or had in employment, eight or more individuals (irrespective of whether the same individuals are or were employed in each such day);

* * * * * * *

"(4) Any employing unit which, together with one or more other employing units, is owned or controlled (by legally enforceable means or otherwise) directly or indirectly by the same interests, or which owns or controls one or more other employing units (by legally enforceable means or otherwise), and which, if treated as a single unit with such other employing units or interests, or both, would be an employer under paragraph (1) of this subsection." (Sec. 19 (h).)

The Board of Review found as facts substantially as follows: that appellee was in 1938 the owner and operator of both establishments, employing in the aggregate eight or more individuals; that upon the transfer of title to the dairy to his wife, he retained supervision, control and management thereof "just as it had theretofore been handled except that at intervals he gave to his wife a check

for the profits, if any, accrued"; that appellee employed and discharged all employees and fixed their rate of pay and hours of work; that he received no salary for managing the dairy, and profits therefrom were used by his wife in remodeling and furnishing their home; that his wife and son were permitted to write checks on his personal account to which the money received from the operation of the dairy was deposited; that while a separate set of books of account was set up, there was no balancing of accounts between the drug store and the dairy.

In addition to the findings by the Board of Review, the occasion and purpose of the transfer to Mrs. Avent were thus explained by appellee himself: "in talking confidentially with Mr. B. one night—I was discussing with him the tax I was having to pay, unemployment tax, and he said 'deed the property to your wife then you will get out of it', so I proceeded at once to deed the dairy to my wife in order to keep from paying the tax." He further stated that his wife wanted to build a new home, and that it was understood that it was to be furnished at his wife's expense and that her only available source of income was the dairy. Mrs. Avent testified that, regardless of the matter of record to the dairy, she and her husband "really operated those two businesses with the same purpose and for the same interest, for each other and for (our) son."

In view of Section 6 (i) of the Act, the findings of fact by the Board of Review, being amply supported, should have been taken as conclusive by the trial court and are so taken by us. This section is as follows: "In any judicial proceeding under this section, the findings of the Board of Review as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of said court (Circuit Court) shall be confined to questions of law."

We are not concerned with the validity of the conveyance of the dairy to the wife of appellee, nor with the right of a taxpayer to avoid liability for a tax by completely divesting himself of his status as an "employing unit". One may avoid the status but not evade the liability. The sole question here is whether appellee under the particular circumstances of the case so completely altered the status of

the two employing units that they ceased to be "controlled (by legally enforceable means or otherwise) directly or indirectly by the same interests." In this connection the affinity between the two activities is as relevant as that between their two proprietors. The argument of appellee based upon a lack of congruity between a drug store and a dairy does not consist with actual facts nor popular conception. It would do injustice to the modern drug store to question its ability to cater to the multiplied needs both of the inner man and the outer woman within the range of the average imagination. Its versatility and resourcefulness has long since passed into proverb. Only one untutored in modern merchandising methods would contend that the drug store counted itself alien to anything which affected the comfort or caprice of its constituency. Certainly, the products of a dairy have become by popular demand a leading accessory to its success.

So that the array of cited authorities which fix liability upon corporations which are controlled by the same interests through majority stock ownership find more evidence justification in considering the liability of individuals, especially since the statute specifically includes employing units which are "controlled * * * indirectly by the same interests * * *," and embraces within the definition of such units "any individual".

We are of opinion that the quality of control retained and exercised by appellee, interpreted in the light both of his expressed purpose to evade liability and of the benefits still accruing directly and indirectly to him, operates to keep it within the spirit and purpose of the act. The trial court was in error in overruling the findings of the Board of Review.

Reversed, and judgment here for Appellants.

Endorsed on back: # 34,712, Mississippi Unemployment Compensation Com'n, et al vs. T. E. Avent. Filed 10/27/41. Tom Q. Ellis, Clerk, 14781.

## EXHIBIT "2".

### IN THE SUPREME COURT OF MISSISSIPPI.

No. 34,712.

In Banc: 14801.

MISSISSIPPI UNEMPLOYMENT COMPENSATION COMMISSION, et al.

*vs.*

T. E. AVENT.

ALEXANDER, *J.*:

**On Suggestion of Error.**

The suggestion of error stresses again the contentions reviewed in the former opinion and overlooks that the identity between the two activities involved was not adjudged solely upon their compatibility as related occupations, but also upon the relationship between the husband who, for all practical purposes, is in control of both establishments, and the wife who, though the legal owner, is only nominally the proprietor of the dairy. The record separation of the two activities was deemed not to have been sufficiently removed from mere formality to divest them of that unity of control and interest contemplated by the act.

It is next suggested that, even though the act in question is constitutional, a construction thereof which operates to include appellee within its provisions results in depriving him of the property without due process of law, and denies to him the equal protection of the law, contrary to Mississippi Constitution, Sec. 14, and the United States Constitution, Art. 14, Sec. 1. This contention was before the Court in considering this appeal and its decision was intended as a rejection thereof. Yet it is well to make specific reference thereto so that it may appear that the interpretation and application of the statute is held not violative of either the state or federal constitution.

Suggestion of error overruled.

Endorsed on back: 34,712. Mississippi Unemployment Compensation Commission, et al vs. T. E. Avent. Filed 11/24/41. Tom Q. Ellis, Clerk. 14801.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

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# No. 1067

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T. E. AVENT,

*Appellant,*

v.

MISSISSIPPI UNEMPLOYMENT COMPENSATION COMMISSION AND R. B. RAGLAND, SR.,

*Appellees.*

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## MOTION TO ADVANCE.

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*May it Please the Court:*

All parties to this suit, herein pending on appeal, respectfully move that this case be advanced for hearing during the present term.

In compliance with the rules of this Honorable Court, a brief statement of the matter involved and the reasons in support of the motion follow:

### Matter Involved.

This is a case wherein is drawn in question the validity of Section 19 (h) (4) of the Mississippi Unemployment Compensation Law, (Chapter 176, Laws of 1936, as amended by Chapter 3 of the First Extraordinary Session of 1936, Chapter 147 of the Laws of 1938 and Chapter 295 of the

Laws of 1940), on the ground of its being repugnant to the Constitution of the United States. The appeal is from a final decision and judgment of the Supreme Court of Mississippi wherein the statute was held to be valid against the claim of appellant here that it was, and is, repugnant to the Fourteenth Amendment to the Constitution of the United States, in that denied the appellant the equal protection of the law and that it deprives him of his property without due process of law.

**Reasons in Support of Motion.**

(1) The status of many employing units and their employees, under the Mississippi Unemployment Compensation Law, will be affected directly by final judicial action herein. The former are now gravely concerned with possible liability for contributions under the statute, the latter with rights to benefits thereunder.

(2) The State of Mississippi, through its Unemployment Compensation Commission, can more effectively administer its unemployment compensation program when the constitutional questions involved in this case are settled.

(3) The federal constitutional questions involved in this appeal are of paramount importance and of general public interest and concern. The unemployment compensation laws of over thirty of the states contain a provision identical with or substantially similar to that portion of the Mississippi Unemployment Compensation Law involved herein. Literally thousands of employing units and workers throughout the United States are, therefore, deeply concerned with and will be affected directly by the ultimate decision of this case. This Honorable Court has not passed directly upon the validity of such provisions and, until it does so, doubt and uncertainty will continue to exist with respect thereto.

(4) The appellant herein, because of his potential tax liability, is directly interested in a speedy determination hereof.

WHEREFORE, all parties hereto join in this motion and pray that this Honorable Court will advance the cause upon its docket for submission and decision.

Respectfully submitted,

T. E. AVENT,
*Appellant,*
By PHIL STONE,
RUFUS CREEKMORE,
*His Attorneys,*
MISSISSIPPI UNEMPLOYMENT COMPENSATION COMMISSION,
*Appellee,*
By GREEK L. RICE,
*Attorney General of the State of Mississippi,*
HARRY M. BRYAN,
*Its Attorneys,*
R. B. RAGLAND, SR.,
*Appellee.*

(9480)

No. 1067. AVENT *v.* MISSISSIPPI UNEMPLOYMENT COMPENSATION COMMISSION ET AL. Appeal from the Supreme Court of Mississippi. April 6, 1942. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, 510–13; *Great A. & P. Co.* v. *Grosjean*, 301 U. S. 412; *H. E. Butt Grocery Co.* v. *Sheppard*, 311 U. S. 608; *Helvering* v. *Clifford*, 309 U. S. 331. *Mr. Rufus Creekmore* for appellant. Reported below: 4 So. 2d 296, 684.